LIBRARY
SUPREME COURT U.S.

Office - Supreme Court, U.S.
FILED
OCT 13 1956
JOHN T. FEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956.

**No. 423**

GOVERNMENT AND CIVIC EMPLOYEES ORGANIZING COMMITTEE, CIO, AN UNINCORPORATED ASSOCIATION; E. J. HABSHEY,

*Plaintiffs-Appellants,*

*vs.*

S. F. WINDSOR, HARRELL HAMMONDS, KNOX McRAE, CLARENCE V. EVANS, AND MELVIN DAWKINS,

*Defendants-Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION.

## BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

ARTHUR J. GOLDBERG,
1001 Connecticut Ave., N. W.,
Washington, D. C.,

DAVID E. FELLER,
1001 Connecticut Ave., N. W.,
Washington, D. C.,

HERBERT S. THATCHER,
Tower Building,
Washington, D. C.,

MILTON I. SHADUR,
231 South La Salle Street,
Chicago, Illinois,

COOPER, MITCH & BLACK,
1329 Brown-Marx Building,
Birmingham 3, Alabama,

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956.

---

**No. 423.**

---

GOVERNMENT AND CIVIC EMPLOYEES ORGANIZING COMMITTEE, CIO, AN UNINCORPORATED ASSOCIATION; E. J. HABSHEY,

*Plaintiffs-Appellants,*

*vs.*

S. F. WINDSOR, HARRELL HAMMONDS, KNOX McRAE, CLARENCE V. EVANS, AND MELVIN DAWKINS,

*Defendants-Appellees.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION.

---

## BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

---

Defendants-appellees, in their Motion to Dismiss or Affirm, seek to cloud the serious constitutional issues squarely presented hereby making the case over. But the facts are plain and uncontradicted in the record:

1. Plaintiff Union is an organization having as one of its purposes:

"Second: To increase the wages and improve the conditions of employment of our members by legislation, negotiation or other legitimate means."

2. When defendants denied that plaintiff Union had the right to negotiate with defendants as to Alcohol Beverage Control employees, plaintiff Union acceded to such denial and thereafter sought to assist its members in individual employment problems and to meet and consult with them as to economic and political issues and public and private affairs. As the Alabama Supreme Court pointed out, part of plaintiff Union's activity after defendants' refusal to bargain collectively was reflected in the following testimony by Battles, the Union representative:

"A. I see what you mean. I went there with a group of employees before the Personnel Board after that, and we did settle quite a few grievances which they had."

3. The Alabama Supreme Court has held on these facts, comprising the identical record before this Court, that plaintiff Union is a "labor organization." Under the Solomon Act, then:

"Any public employee who joins or participates in [Government and Civic Employees Organizing Committee, C. I. O.] or who remains a member of or who continues to participate in [Government and Civic Employees Organizing Committee, C. I. O.] shall forfeit all rights afforded him under the State Merit System, employment rights, re-employment rights, and other rights, benefits, or privileges which he enjoys as a result of his public employment."

Defendants' entire case rests on a *non sequitur*—the fallacious third term of the syllogism stated at page two of defendants' Motion to Dismiss or Affirm:

"In short, the act prohibits a state employee from being a member of or participating in such an organi-

> zation for the purpose of collective bargaining with the state."

It is union membership alone that the Solomon Act outlaws for the public employee, not membership for purposes of collective bargaining; and the Alabama Supreme Court has upheld that outlawry because the declared purposes of plaintiff Union include, among other things, the increasing of its members' wages and improvement of their conditions of employment "by legislation, negotiation or other legitimate means" and because one of its activities was to assist its members in presentation of their individual grievances.

Imposition of such an arbitrary condition on all state employees has never come before this Court until now. Unable to meet the constitutional merits on this ground, defendants attempt to sidestep the constitutional infirmity by making this case what it is not.

Thus, this Court is not here concerned with the question whether a state can legally prohibit unionization among policemen or firemen (as in the *Hickman, King, City of Jackson, Fraternal Order of Police, Coane, Hutchinson, Carter, McNatt* and *San Antonio Fire Fighters' Local* cases on which defendants' Motion to Dismiss or Affirm seeks to rely at pages 4 and 5). In such cases the special, semi-military problems of discipline have controlled the judicial decisions:

> "The police and fire departments are in a class apart. Both are at times charged with the preservation of the public order, and for manifold reasons they owe to the public their undivided allegiance. The power in the state of complete control is imperatively necessary if discipline is to be maintained." *Carter* v. *Thompson*, 164 Va. 312, 180 S. E. 410, 412.

Plaintiff Habshey is a liquor salesman employed in a state operated retail liquor store—scarcely a member of a "class apart."

Nor is this Court here concerned with the question whether a state can legitimately bar a union which is insisting on its right to collective bargaining as the means for fixing the terms and conditions of public employment (as in the *Miami Local Water Works* case, on which defendants' Motion to Dismiss or Affirm seeks to rely at page 5). Perhaps nothing illustrates the arbitrary character of the Solomon Act in its application to plaintiff Union quite as well as Battles' testimony on which the Alabama Supreme Court and defendants' Motion to Dismiss or Affirm seized, as to "settl[ing] quite a few grievances which they [the employees] had."

For the processing of grievances is the converse of collective bargaining—the individual settlement of individual employee problems within the framework of a fixed employment relationship, as contrasted with the establishment of the terms and conditions of the employment relationship itself for an entire employee group. This basic distinction has been recognized by Congress in the National Labor Relations Act (29 U. S. C. § 159 (a)):

> "(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; *Provided*, that any individual employee or a group of employees shall have the right at any time to present grievances to the employer and have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment,"

and by such decisions as *Mugford* v. *Mayor and City Council of Baltimore*, 185 Md. 266, 44 Atl. 2d 745, 747 (1945),

where after holding that a union could not insist on collective bargaining to fix the terms and conditions of public employment, the court said:

> "But it by no means follows that employees may not designate a representative or spokesman to present grievances.
>
> "It has been frequently held that a municipality, in performing work or other duties it is required by law to do, cannot discriminate in favor of members of a labor union. Such action would not only be unlawful but would also tend to constitute a monopoly of public service by members of a labor union, which the law does not countenance. By the same force of reasoning, a citizen who is a member of a union cannot, by that fact alone, be barred from a position in the public service (citing authorities)."

Indeed, to prohibit to an employee the right of assistance and counsel of his choice in the presentation and disposition of his individual employment problems at a Personnel Board hearing in itself presents another aspect of the due process problem. Compare this Court's statement in *Powell* v. *Alabama*, 287 U. S. 45, 69; 77 L. Ed. 158, 53 S. Ct. 55 (1932), most recently quoted in *Chandler* v. *Fretag*, 348 U. S. 3, 10, 99 L. Ed. 4, 75 S. Ct. 1 (1954):

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

When the state's representatives advised plaintiff Union that collective bargaining—meaning the collective negotiation of the terms and conditions of the basic employment relationship—was not "legitimate", plaintiff Union complied with its basic statement of purpose and refrained

from such negotiation. But when plaintiff Union, as an association of individuals, acts to aid and counsel those individuals in the hearings on their individual problems and grievances at their request, denial of that right is a deprivation of due process.

Rather than the nonexistent case that defendants ask this Court to affirm, this Court is here called upon to decide the case properly before it: Whether the Constitution permits a state to bar union membership to its employees because the union believes in collective bargaining, where legitimate, as one of its ultimate objectives and because the union has aided its members in the disposition of their individual grievances. The constitutional choice is between *C. I. O.* v. *Dallas*, 198 S. W. 2d 143 (Tex. Civ. App.), cited at page 5 of defendants' Motion To Dismiss or Affirm, on the one hand, and this Court's own decisions in:

> *Slochower* v. *Board of Higher Education*, 350 U. S. 551, 100 L. Ed. 449, 76 S. Ct. 637 (1956).
>
> *Wieman* v. *Updegraff*, 344 U. S. 183, 97 L. Ed. 216, 73 S. Ct. 215 (1952).
>
> *Adler* v. *Board of Education*, 342 U. S. 485, 96 L. Ed. 517, 72 S. Ct. 380 (1952).
>
> *Garner* v. *Board of Education*, 341 U. S. 716, 95 L. Ed. 1317, 71 S. Ct. 909 (1951)

on the other hand.

It is because defendants wholly ignore the impact of this Court's decisions that they also mistake the thrust of the equal protection argument. No one contends that the state must cure an entire evil in all its possible applications at one time. But where the question is whether the evil exists at all—whether the statutory standard is a "reasonable, lawful and nondiscriminatory term" (*Slochower* v. *Board of Higher Education*, 350 U. S. 551, 555.

100 L. Ed. 449, 453, 76 S. Ct. 637, 639-640 (1956)), to impose on government employment—the exceptions made by that statute become relevant. We resubmit that whatever the "evil" of Union membership may be upon which the Solomon Act is grounded (or even whatever the "evil" of collective bargaining as to public employees might be), there can be no rational explanation as to why that "evil" does not pervade the unionization of (or collective bargaining for) teachers, or city employees, or county employees, or State Docks Board employees. The Alabama legislature has not "excluded from regulatory measures organizations which it has reason to believe are already appropriately regulated by either state or national legislation," which this Court found sufficient justification for the classification in *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 472, 89 L. Ed. 1725, 65 S. Ct. 1384 (1945), relied on by defendants. Instead, the arbitrary and specific exceptions to the general statutory rule constitute the same type of "invidious discrimination" which this Court has so often held to violate the equal protection clause.

Finally, it will not do for defendants to raise the straw man, which they seek to draw as a "reasonable conclusion from reading the decision of the Supreme Court of Alabama," that the plaintiffs might not be subject to the Solomon Act and therefore might lack standing to raise the constitutional questions here. Defendants cannot escape the fact that the Alabama Supreme Court flatly held plaintiff Union and its members subject to the Solomon Act. The identical record on which the holding was made is the record before this Court, and the question whether such application of the Act to plaintiff Union and its members is constitutional cannot be dodged. Where the facts before this Court, as here, are the same facts on which the state court has held the challenged act ap-

plicable, the constitutional question is presented four-square.

When the position of defendants and the decision of the Alabama Supreme Court are stripped of verbiage, it is plain that plaintiff Union has been found a "labor organization" under the Solomon Act, and its members have been barred from state employment, because plaintiff Union and its members share a belief in the process of collective bargaining where legitimate. Such a belief has been held fatal by the state court even though on the record that belief is not being translated into action. We submit that this untenable doctrine inhibits plaintiffs' constitutional rights for fear of a nonexistent "danger" which is neither "clear" nor "present".

We resubmit that the constitutional questions presented by this appeal are substantial and accordingly ask that defendants' Motion To Dismiss or Affirm be denied.

Respectfully submitted,

ARTHUR J. GOLDBERG,
1001 Connecticut Ave., N. W.,
Washington, D. C.,
DAVID E. FELLER,
1001 Connecticut Ave., N. W.,
Washington, D. C.,
HERBERT S. THATCHER,
Tower Building,
Washington, D. C.,
MILTON I. SHADUR,
231 South La Salle Street,
Chicago, Illinois,
COOPER, MITCH & BLACK,
1329 Brown-Marx Building,
Birmingham 3, Alabama,
*Counsel for Appellants.*